NO. 84-871

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In the Supreme Court of the United States

October Term, 1984

LOUISIANA PUBLIC SERVICE COMMISSION,
Appellant

VERSUS

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Appellees

On Appeal from the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM

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This reply brief is submitted on behalf of the Louisiana Public Service Commission ("Louisiana Commission"), to review the grounds establishing that the motions to dismiss or affirm of the appellees, the Federal Communications Commission ("FCC") and United States of America (collectively, the "Government"), and AT&T, the Bell Operating Companies and certain other telephone companies (collectively, "telephone companies"), and the contentions of GTE Service Corporation ("GTE") in its brief supporting the appellees, should be rejected.

ARGUMENT

1. The Government and the telephone companies assert that this appeal should be dismissed because the decision of the court of appeals does not "expressly strike down any particular state ratemaking order." (Gov't.

Motion at 11; Tel. Cos. Motion at 8-9). These parties rely on *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. 615 (1984), where this Court reiterated the longstanding rule that decisions expressly invalidating state laws as unconstitutional are appealable, while those voiding actions taken pursuant to state laws are not. 104 S. Ct. at 620-621. In *Silkwood,* the court of appeals had ruled that punitive damages could not be awarded in a particular case because of the preemptive effect of federal law. *See* 104 S. Ct. at 621. This Court determined that the decision, limited to a particular application of a state law, was nonappealable: "While the award itself was struck down, the statute authorizing such awards was left untouched." *Id.*

Silkwood is not applicable here. The *Preemption Decision* has been interpreted in a federal court enforcement proceeding as expressly invalidating state laws — ratemaking orders of the Louisiana Commission. The federal court interpreted the decision as a "direct order . . . specifically declaring that inconsistent state prescribed depreciation rates are void." *South Central Bell Tel. Co. v. Louisiana Public Serv. Comm'n,* 570 F. Supp. 227, 236 (M.D. La. 1983), *aff'd* 744 F.2d 1107 (5th Cir. 1984). The enforcement decision invalidated the state ratemaking orders on a constitutional ground: that they were preempted. 570 F. Supp. at 231-32; 744 F.2d at 1121. The Government and telephone companies fail to explain how the Louisiana ratemaking orders could be deemed "disobedience" of an FCC order, and subject to an enforcement proceeding pursuant to 47 U.S.C. §401(b), if the *Preemption Decision* does not expressly apply to the Louisiana ratemaking orders.

2. The *Preemption Decision* is portrayed by the Government and the telephone companies as consistent

with prior decisions of the courts of appeals approving certain preemptive actions of the FCC. (Gov't. Motion at 14-16; Tel. Cos. Motion at 10). However, no prior ruling of a court of appeals allows the FCC to require state agencies to raise intrastate rates. In prior cases, the courts attempted to reconcile the affirmative authority of the FCC with state powers flowing inferentially from Sections 2(b), 221(b) and related provisions of the Communications Act, and opted to approve the actions of the FCC. In this case, the decision of the court of appeals eviscerates the *express* language of Section 2(b) and the other provisions protecting intrastate ratemaking jurisdiction. Indeed, both the telephone companies and the Government now suggest that Section 2(b) is meaningless as applied to jointly used plant. (Tel. Cos. Motion at 11; Gov't. Motion at 14-15). This elimination of the states' rate setting perogative — over plant assigned to the state jurisdictions in the separations process — is inconsistent with Congressional intent.

The prior decisions are also inapplicable because they only recognize federal primacy when the physical inseparability of plant precludes accommodation of competing federal and state interests. *See North Carolina Utilities Comm'n v. F.C.C.*, 552 F.2d 1036 (4th Cir. 1977); *Computer and Communications Industry Ass'n v. F.C.C.*, 693 F.2d 198 (D.C. Cir. 1982). In this case, the investment subject to the *Preemption Decision* has already been separated from interstate investment and assigned to the intrastate jurisdictions. The different federal and state approaches are not irreconcilable.

3. The decision of the court of appeals has a sweeping impact on intrastate ratemaking. The ruling is not limited to depreciation schedules, but also approves an FCC decision that invalidates the state method of *accounting* for

station connections. The holding authorizes a federal directive to state regulators to raise intrastate rates whenever the FCC has statutory authority to prescribe a practice for *interstate* ratemaking and decides that a contrary intrastate practice frustrates federal objectives. *Virginia State Corp. Comm'n v. F.C.C.*, 737 F.2d 388, 394, 395 (4th Cir. 1984), App. at A-11, A-15. Since the FCC has plenary statutory authority to make all ratemaking determinations in the interstate jurisdiction, the ruling has no limit.[1]

The *Preemption Decision* is not limited to depreciation, contrary to the assertions of the telephone companies and, impliedly, the Government, (Tel. Cos. Motion at 15; G.T.E. Brief at 12 n.21; Gov't Motion at 13). The ruling requires state agencies to abide by the *Expensing Order*, which was not a depreciation prescription, but an order prescribing the accounting treatment for station connections. The *Expensing Order* requires state agencies to stop capitalizing, and start expensing, station connection costs. The FCC described the proceeding as undertaken "to modify the accounting for station connections, and to adopt rules prescribing accounting treatment of optional payment plan revenues and related capital costs, customer

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[1] The telephone companies refer to our Jurisdictional Statement as "singularly misleading" in suggesting that the *Preemption Decision* required an increase in intrastate rates via the Louisiana enforcement action. (Tel. Cos. Motion at 16 n.41). The telephone companies assert that the rate increase injunction was not the result of "FCC premption but rather the exercise of federal court jurisdiction . . . ." *Id.* This glib contention is inaccurate. In the enforcement proceeding, the Fifth Circuit expressly held that "the extent of the court's power to enjoin is commensurate with the reach of the underlying order" and the rate injunction was "tailored to the dictates of the Preemption Order." *South Central Bell Tel. Co. v. Louisiana Public Service Comm'n*, 744 F.2d 1107, 1123 (5th Cir. 1984). The court also recognized that "the Preemption Order comes perilously close to undermining completely state authority and discretion to set intrastate rates . . . ." Id. at 1121.

provided equipment and the sale of terminal equipment." *In the Matter of Amend. of Part 31, Uniform System of Accounts ("Expensing Order")*, 85 F.C.C. 2d 818, 818 (1981). The order amended 16 sections of the Uniform System of Accounts — only two are in the "Instructions for Depreciation Accounting." *See Id.* at 840-44; 47 C.F.R. Part 31.

The telephone companies are inaccurate, and reveal the weakness in their position, by saying that the *Preemption Decision* is "restricted solely to depreciation." (Tel. Cos. Motion at 15). These parties realize that the ruling of the court of appeals would permit the FCC to control all aspects of intrastate ratemaking, and they seek to constrict this Court's perception of the decision. In doing so, the telephone companies implicitly concede that the ruling is indefensible.

4. The Government and the telephone companies present a simplisic statutory review, implying that Section 220(b) of the Communications Act automatically requires the states to adhere to FCC depreciation practices for intrastate ratemaking. (Gov't. Motion at 4-5; Tel. Cos. Motion at 2-4). In this regard, these parties count on a cursory analysis of the issues by the Court. Section 220(b) does authorize the FCC to prescribe depreciation practices, just as Sections 220(a) and (g) permit it to prescribe a uniform system of accounts. App. at 133-36. But these provisions merely establish the basis for uniform *reporting* of carrier transactions; it is an unprecedented leap to assert that state agencies are bound to follow the uniform system for intrastate ratemaking.

By characterizing Section 220 as an authorization for *ratemaking* rather than *reporting*, the Government and the telephone companies argue for a construction that would

preclude state agencies from making any ratemaking adjustments to the costs recorded by telephone carriers in their accounts. The state agencies will become mere conduits, required to change rates whenever the FCC permits telephone companies to alter their methods of reporting costs. This construction is inconsistent with the Communications Act and the applicable ratemaking precedents. (See Juris. St. at nn.105, 106).

In addition, the analysis of legislative history of the telephone companies is invalid. These parties contend that Congress intended to give the FCC power over intrastate depreciation practices because it rejected an amendment that would permit the states "to prescribe their own telephone-company depreciation requirements." (Tel. Cos. Motion at 12). The amendment, however, was unnecessary. In Section 2(b) of the Communications Act, Congress went much further, denying the FCC jurisdiction over all intrastate "charges, classifications, practices, services, facilities, or regulations . . . ." 47 U.S.C. §152(b), App. at A-132.

Furthermore, the telephone companies apparently concede that the preemptive power of the FCC extends only to jointly used plant, (*See* Tel. Cos. Motion at 11). Thus, they implicity coincide that the states may prescribe their own depreciation practices in setting rates for purely intrastate plant. This concession destroys the argument that Section 220(b) preempts all state depreciation practices. Section 220(b), for ratemaking, reaches only as far as FCC ratemaking jurisdiction, and gives no special validity to the depreciation component of the *Preemption Decision*.

5. The Government and the telephone companies ignore serious flaws in the *Preemption Decision* and their

own arguments. First, although these parties rely repeatedly on asserted FCC authority over jointly used plant, they fail to address the fact that the *Preemption Decision* is not so limited. The ruling applies to all state depreciation practices, even those applicable to plant used solely for intrastate communications. *Preemption Decision*, 92 F.C.C.2d 864, 879 (1983), App. at A-49. Exclusively intrastate plant includes subscriber line outside plant, trunk and loop plant and interexchange outside plant used for intrastate private line services; intrastate message circuits; and intrastate private line circuits. *See* 47 C.F.R. § 67.124(b),(c),(d); § 67.125(c),(d). The *Depreciation Order* and *Preemption Decision* apply to this plant. In the enforcement proceeding against the Louisiana Commission, the FCC depreciation rates were applied to purely intrastate plant as well as the intrastate portion of jointly used plant. No justification has even been offered for this preemption of intrastate ratemaking power.

Second, the Government and the telephone companies do not discuss the propriety of a federal agency delegating its preemptive power to regulated carriers. In this case, the FCC gave carriers the *option* of implementing the new depreciation practices or retaining the preexisting procedures; carriers were also allowed to choose among procedures for implementing the accounting rule change for station connections. *See Depreciation Order*, 83 F.C.C.2d 267, 290, 293 (1980); *Expensing Order*, 85 F.C.C.2d 818, 842 (1981). No authority has been cited that permits an agency to authorize a private party to invalidate state laws.

Third, the Government and telephone companies seek to deflect the impact of Section 221(b) of the

Communications Act, 47 U.S.C. § 221(b), which expressly denies the FCC jurisdiction over exchange service regulated by state commissions, even when a portion of the exchange service constitutes interstate communication. App. at 136-37. These parties characterize Section 221(b) as applying only to exchange service that straddles state lines. (Gov't Motion at 14 n.19; Tel. Cos. Motion at 11 n.24). Yet this purported distinction does not make Section 221(b) inapplicable; the *Preemption Decision* applies to plant used for exchange service straddling state lines as well as other exchange service. Moreover, it makes little sense to interpret the statute to give the FCC less authority over exchange service straddling state lines than over exchange service within a state. A more reasonable reading of the act would deny the FCC jurisdiction over all exchange service regulated by state commissions, *even* when the service crosses state lines.

CONCLUSION

The Communications Act prohibits the FCC from ordering state agencies to increase intrastate rates. The preemptive authority of the FCC is limited by the statutory prohibition. The *Preemption Decision* is a dramatic thrust beyond the prescribed limits of federal jurisdiction; the ruling of the court of appeals would permit the preemption of all intrastate ratemaking. Therefore, the Court should grant plenary review and reverse the rulings of the FCC and court of appeals.

Respectfully submitted,

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